JUDITH DIANE DUFF LEACH, *etc., et al.*,
Plaintiffs - Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, *et al.*,
Defendants - Appellees.

No. 87-1921.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Dec. 2, 1988.

Minority shareholders in bank brought RICO and National Bank Act action against directors and officers. The United States District Court for the Northern District of Texas, Halbert O. Woodward, J., dismissed, and minority shareholders appealed. The Court of Appeals, Goldberg, Circuit Judge, held that minority shareholders did not suffer injury distinct from that suffered by the bank and thus did not have standing.

Affirmed.

1. Corporations 1.1(2)

A corporation is an artificial being, invisible, intangible and existing only in contemplation of law.

2. Banks and Banking 253

Provisions of the National Bank Act that every director who participates or assents to violation of the Act shall be liable for all damages which the bank or its shareholders have suffered was intended to differentiate between persons who suffered injury which the law treats as corporate injury and persons who suffered injury which the law treats as personal to the person. National Bank Act, 12 U.S.C.A. § 93(a).

3. Banks and Banking 254

Right of minority shareholders of national bank to complain of injury in the nature of loss of bank's stock value because of mismanagement and fraud by directors and officers belonged to the corporation, not the minority shareholders. National Bank Act, 12 U.S.C.A. § 93(a)

4. Statutes 208

Even apparently plain words, divorced from the context in which they arise in and which their creators intended them to function, may not accurately convey the meaning the creators intended to impart; it is only within context that a word, any word, can communicate an idea.

5. Banks and Banking 254

Minority shareholders of national bank did not have standing to assert RICO claim against officers and directors whose alleged mismanagement and fraud allegedly resulted in loss of value of the corporate stock, as the minority shareholders did not suffer injury to their property which was distinct from injuries suffered by the corporation. 18 U.S.C.A. § 1964(c).

6. Commerce 82.72

State law property principles are used to determine whether RICO plaintiff has suffered an injury to his property. 18 U.S.C.A. § 1964(c).

Federal Courts 612

Court of Appeals would not consider claim that plaintiffs had standing to assert cause of action under the Federal Reserve Act where that cause of action had not been asserted in the district court. Federal Reserve Act, § 22, as amended, 12 U.S.C.A. § 503.

Appeal from the United States District Court for the Northern District of Texas.

Before GOLDBERG, HIGGINBOTHAM and DAVIS, Circuit Judges.

GOLDBERG, Circuit Judge:

[1] Bodyless souls do not walk with feet of clay. Without feet, they cannot stand. The Plaintiffs-Appellants in this case would have us don sovereign robes and create feet of clay for them. We shall not array ourselves with such fine garments, and thus we will not, and cannot, accede to the Plaintiffs' request.[1]

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1. *See The Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636, 4 L.Ed. 629 (1819) ("A corporation is an artificial being, invisible, intangible and existing only in contemplation of law.")

Plaintiffs are minority shareholders of the Seminole State National Bank ("Bank"). The Appellees-Defendants include former directors and officers of the failed Bank[2], the Federal Deposit Insurance Corporation, in its capacity as receiver of the failed bank, and MBank Dallas, a creditor of the failed bank. According to the complaint, Plaintiffs' bank stock lost all of its value because of mismanagment of the bank by Defendant directors. Plaintiffs asserted two causes of action against the Defendants. The first claim arises under the National Bank Act, 12 U.S.C. § 93(a) (1982). The second claim arises under 18 U.S.C. § 1964(c) (1982), the Racketeer Influenced and Corrupt Organization Act ("RICO").

The district court granted the Defendants' motions to dismiss for failure to state a claim for lack of standing. We agree, and hold that a minority shareholder cannot assert a claim as an individual under the circumstances of this case pursuant to either the National Bank Act, Section 93(a) or RICO, Section 1964(c). Accordingly, we AFFIRM the judgment of the district court.

I. FACTUAL BACKGROUND

According to Plaintiffs' first amended complaint[3], they owned approximately 3,300 shares of the bank's stock which constituted a minority ownership in the Bank. The Directors and officers allegedly failed to manage properly the business matters of the bank and failed to advise the Plaintiffs in a proper and timely manner of the true financial condition of the Bank. Plaintiffs allege that MBank concealed the true financial condition of the Bank from the Plaintiffs when MBank Dallas knew of, and helped to conceal, the fraud and mismanagement perpetrated by the Defendant directors. Plaintiffs allege that they have suffered actual damages because they have lost the value of their stock as a direct result of the Defendants' misbehavior.

Our decision focuses on whether the Plaintiffs have standing to assert claims arising from the diminution in the value of their stock. The Plaintiffs filed their complaint on March 14, 1986. This was nearly two years after

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2. The directors and officers of the Seminole State National Bank who have filed separate responses as appellees are B.C. Clark, Paul Condit, Walker Dearing, Jr., Dwayne Herman, D.G. Hoffman, C.D. Wickson, Jr., Carroll Haralson, Alton Freeman, Reeves Cothes, George Shivers, Dr. Joe Cauley, Richard Watts, S.H. Hart, Sr., Kenneth Newcomb and R.D. Skelton, Sr.

3. Because the district court dismissed Plaintiffs' first amended complaint on motions to dismiss, we will accept all of Plaintiffs' allegations as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974).

Comptroller of the Currency declared the Bank insolvent and appointed the FDIC as Receiver of the Bank on March 16, 1984. Before filing their complaint, Plaintiffs did not make a demand on the FDIC-Receiver requesting the FDIC to file a direct action against the Defendant directors. As we shall see, this plays a significant role in our standing inquiry.[4]

II. DISCUSSION

The district court dismissed Plaintiffs' first amended complaint for a lack of standing. It held that for minority shareholders to maintain an action under either the National Bank Act, 12 U.S.C. § 93(a), or RICO, 18 U.S.C. § 1964(c), Plaintiffs needed to allege "some injury other than a decline in the value of the bank stock in order to state a direct, personal injury distinct from that suffered by the corporaton that would permit [the Plaintiffs] to maintain an individual cause of action." The district court then gave the Plaintiffs leave to amend their complaint, against all Defendants except the FDIC, to allege a direct injury or state another cause of action. The Plaintiffs did not file another complaint. Plaintiffs now urge us to reverse the district court and find that they have standing to assert their claims against the Defendants.

The Plaintiffs assert that they have standing to sue under both the National Bank Act, 12 U.S.C. § 93(a), RICO, 18 U.S.C. § 1964(c), and the Federal Reserve Act, 12 U.S.C. § 503. An earlier decision of this court, *Crocker v Federal Deposit Insurance Co.*, 826 F.2d 347, 349 (5th Cir. 1987), controls the RICO claim. In contrast, the National Bank Act provision, requires a fuller and more detailed consideration. Nonetheless, we conclude that these minority shareholders do not have standing to assert their claim under 12 U.S.C. § 93. The Plaintiffs also contend they have a cause of action under the Federal Reserve Act, 12 U.S.C. § 503. They failed to raise this under 12 U.S.C. § 503.

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4. The FDIC-Receiver for the failed bank has advised us that it has sued the directors based upon the allegations in the Plaintiffs' complaint.

A. *Minority Shareholders' Standing Under The National Bank Act, 12 U.S.C. § 93(a)*

For the court to hear a person's complaint, a person must have "standing" to assert the claim. The Supreme Court has expressed the notion of standing using various verbal formulae over the years. Some of these tests have included (1) "the injury in fact and "zone of interests" tests, *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970); (2) "the threatened or actual injury" test, *Linda R.S. v Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973); and (3) "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting person in Plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975).

Essentially, standing analysis involves two separate prongs. The first prong is "injury in fact." *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). This prong tests a person's genuine concern with the case in order to insure the integrity of the adversarial process. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). Sometimes Congress statutorily defines who is injured in fact. *Linda R.S. v Richard D.*, 410 U.S. 614, 617 n. 3, 93 S.Ct. 1146, 1148 n. 3, 35 L.Ed.2d 536 (1973). Our case does not involve this "injury in fact" prong. Plaintiffs have alleged a real and distinct injury — the loss of the value of their stock.

It is the second prong of standing law, what is sometines referred to as the "zone of interest" test, that is the focus of our decision. "The zone of interest test is a guide for deciding whether . . . a particular plaintiff should be heard to complain of a particular" injury. *Clarke v. Securities Industry Ass'n.*, 479 U.S. 388, 107 S.Ct. 750, 757, 93 L.Ed. 2d 757 (1987); *see Block v. Community Nutrition Institute*, 467 U.S. 340, 347, 104 S.Ct. 2450, 2454-55, 81 L.Ed.2d 270 (1984) (essential inquiry is whether Congress intended a particular class of plaintiffs to be able to sue). "The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke*, 107 S.Ct. at 757.

1. History of 12 U.S.C. § 93(a)

To decide whether a plaintiff is arguably within the zone of interest recognized by a particular statute itself to determine whether Congress intended to allow the plaintiff to sue.

[2] On its face, 12 U.S.C. § 93(a) is worded broadly and appears to allow a wide range of suits for injuries allegedly resulting from the misconduct of a bank's directors, agents or officers. However, the historical context in which the provision was passed, the judicial decisions which followed its passage, and judicial decisions from the modern era, all militate in favor of a narrower reading of Section 93(a) than the reading advocated by minority shareholders. Thus, we conclude that Congress intended the statute, 12 U.S.C. § 93(a) to differentiate between persons who have suffered injury which the law treats as "corporate" injury and persons who have suffered injury which the law treats as "personal" to the person.

For example, when a director embezzles the assets of a corporation, and the value of the corporation's stock falls as a result, the law treats the corporate body as the injured party, not the individual stockholder who has lost the value of his stock. On the other hand, the law treats a person who *buys* stock in reliance on false information from a director as personally injured by the director's conduct. See *Chesbrough v. Woodworth*, 244 U.S. 72, 88, 37 S.Ct. 579, 586, 61 L.Ed. 1000 (1917). On a certain level, the difference is a matter of *diffusion* of injury. That is, when all shareholders are wounded it is the corporate body itself which the law treats as experiencing the pain. When only one person suffers and the other shareholders have not been hurt by the misconduct, the law recognizes that person's pain as personal.

[3] Plaintiffs in this case seek to show that they are different from all the other stockholders because they are the only ones who have lost money from the directors' mismanagement. However, corporate law, as it existed when the National Bank Act was passed in 1864, treated a director's mismanagement, resulting in a diminution in the corporation's stock value, as a corporate injury. The right to complain of the injury belonged then and belongs now to the corporation. There are exceptions to this rule that allow shareholders to sue derivatively for corporate injury. They arise, for example, when that corporation refuses to sue after being asked by the shareholder, or when the corporation has been "captured" by the misbehaving directors so that any demand made would be vain. But these exceptions only provide mechanisms to protect the corporation when it will not or cannot protect itself. In this case, any possible legal relief for Plaintiffs' grievances belongs to the corporate body not in the hands of the FDIC-Receiver, not the Plaintiffs.

The first step in our standing inquiry under Section 93(a) requires us to examine the statute. Section 93(a) of the National Bank Act reads:

> If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and the franchises of the association shall be thereby forfeited. Such violation shall, however, be dtermined and adjudged by a proper district or Territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violations.

This statute was enacted June 3, 1864, as part of a comprehensive act, the National Bank Act.[5] The stated purpose of the Act is "to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof[.]" 12 U.S.C. § 38 (1982).

[4] This statute on its face would appeart to permit plaintiffs to sue the defendants for alleged mismanagment which allegedly caused Plaintiffs' stock to lose its value. The last sentence of section 93(a) states that "every director who participated [in violation of the Bank Act] shall be held liable in his personal and individual capacity for all damages which the association, *its shareholders*, or any other person, shall have sustained in consequence of such violation" (emphasis added). However, even apparently plain words, divorced from the context in which they arise and in which their creators intedned to impart. It is only, therefore, within a context that a word, any word, can communicate an idea.

Section 93(a) of the National Bank Act as enacted in 1864 was not created in a vacuum.[6] In this pre-*Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), era, it was commonly understood that there existed a general commercial common law. In 1856, the United States Supreme Court, in a commercial case involving a Mississippi statute, stated:

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5. Section 93A)a remains essentially unchanged from its original enactment as reflected at 13 Statutes at Large 116. This is the same section as Revised Statutes § 5239.

6. There is no pertinent legislative history for Section 93(a).

> The general commercial law being circumscribed within no local limits, nor committed for its administration to any peculiar jurisdiction, and the Constitution and laws of the United States having conferred upon the citizens of the several States, and upon aliens, the power or privilege of litigating and enforcing their rights acquired under and defined by that general commercial law, before the judicial tribunals of the United States, it must follow by regular consequence, that any state law or regulation, the effect of which would be to impair the rights thus secured, or to devest the federal courts of cognizance thereof, in their fullest acceptation under the commercial law, must be nugatory and unavailing.

Watson v. Tarpley, 59 U.S. (18 How.) 517, 521, 15 L.Ed. 509 (1856). In 1864, general commercial law created a background upon which a statute could be drawn to provide context for the abstract ideas encompassed in the statute. The interstices of a federal commercial statute were also meant to be filled by the prevailing general commercial law norms.

The particular area of the general commercial law which provides a background for the National Bank Act is corporate law. While the antecedents of the modern corporation reach back to Ancient Rome,[7] the large commercial corporations of the modern era began to make their appearance in the form of the great trading houses of England during the middle of the Seventeenth Century.[8] By the time of Chief Justice John Marshall, the corporate entity as we know it had begun to take shape. Justice Marshall, in the *Dartmouth College* case of 1819, described the corporation as follows:

> A corporation is an artifical being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity,

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7. 1 W. Blackstone, Commmentaries *468, 469.

8. Some of the more familiar trading corporations were the East India Company and Hudson Bay Company. 1 W. Fletcher, *Fletcher Cyclopedia Corporations*, § 1 (rev. perm. ed. 1983).

> of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.

The Trustees of Dartmouth College, v. Woodward, 17 U.S. (4 Wheat.) 518, 636, 4 L.Ed. 629 (1819); *see generally* Comment, *The Personification of the Business Corporation in American Law*, 54 U.Chi.L. Rev. 1441 (1987).

As part of the general commercial common law, it was understood that only the corporate body could sue misbehaving directors for wounds that the corporation suffered resulting from directors' misconduct. One commentator of the late Nineteenth Century explained the law as follows:

> [F]rauds, *ultra vires* acts, and acts of negligence [by the directors], are injuries to the corporation, and the corporation is ordinarily the party to bring suit to rectify them. The frauds, *Ultra vires* acts, and negligence of directors, do not affect the stockholder directly, but they affect the stockholders indirectly by decreasing the corporate assets, and thereby affecting the value and privileges of the stock.
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> It was [during 1742 to 1850] the duty of the corporation to bring suit to remedy these wrongs. But it gradually became apparent that frequently the corporation was helpless, and unable to initiate the suit . . . The time had come when the minority of the shareholders of a defrauded corporation, the corporation itself being controlled by the guilty parties, must be given a standing in court for the purpose of taking up the cause of the corporation, and in its name and stead bringing the guilty parties to an account.

W. Cook, *Law of Stock and Stockholders § 644-45 (1887).*[9] In 1882, the Supreme Court, in *Hawes v. City of Oakland*,[10] echoed the view commentator Cook put forth concerning the general commercial law of derivative actions.

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9. For another 1864 contemporary commentator's view on this subject, see C. Beach, *Commentaries on the Law of Private Corporations*, §§ 878-87 (1891).

10. 104 U.S. 450, 460-61, 26 L.Ed. 827 (1882); *see also Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 15 L.Ed. 401 (1856).

What we today term a shareholder derivative suit was a part of the general commercial common law when Congress enacted Section 93(a) in 1864. When writing Section 93(a), Congress relied upon the fact that injured shareholders did not possess a right of action against delinquent directors until the corporation itself had refused to bring suit. In our post-*Erie v. Tompkins* era, 304 U.S. 6a4, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), this idea of an enforceable background of general commercial law does not exist. But it is this context which gives meaning to the phrase "every director . . . shall be liable . . . for all damages which the association, its shareholders, or any other person, shall have sustained . . . " 12 U.S.C. § 93(a).

Judicial decisions rendered after 1864, but before *Erie*, demonstrate further that Section 93(a) has a narrower reach than its language facially suggests. A court in 1882, when construing Section 93, stated:

> When the clause in question [Section 93[a)] gives a private remedy, derived from the misconduct of the directors, to the individual stockholder, the only reasonable deduction from the words and purposes of the law is, that such redress is aimed at injuries directly and not indirectly falling on such stockholder. In the present case, the injury is indirect and derivative: the plaintiff has suffered a loss because the property of the corporation was squandered, purloined or lost. Now, for such a loss the statute gives to the company the right to obtain an indemnification by suit, and by such recovery the indirect and derivative loss of the stockholders is, *ipso facto*, repaired.

Conway v. Halsey, 44 N.J.L. 462, 466 (1881) (Plaintiff's stock rendered worthless by director misconduct.)[11]

In contrast, the type of Bank Act violation that injures a particular plaintiff personally but does not injure the corporation illustrated by *Chesbrough v. Woodworth*, 244 U.S. 72, 77, 37 S.Ct. 579, 582, 61 L.Ed. 1000 (1917). In *Chesbrough*, the defendant directors made false and misleading reports concerning the financial condition of the bank. *Id.* at 73, 37 S.Ct. at 580. The plaintiff suffered damage because he "*purchased* stock upon the faith of the action of Defendants." *Id.* at 74, 37 S.Ct. at 581 (emphasis added). The bank suffered no damage. The injury created by the purchase of worthless stock was personal to the plaintiff.[12]

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11. *See Howe v. Barney*, 45 F. 668 (C.C.S.D. Ohio 1891).

12. *Compare Empire Life Ins. Co. of America v. Valdek Corp.*, 468 F.2d 330, 335-36 (5th Cir. 1972) (an example of direct injury arising out of an independent, direct duty) *with Stevens v. Lowder*, 643 F.2d 1078, 1079-80 (5th Cir. 1981) (loss of value of stock runs to corporation). *See also Zimmern v. Blount*, 238 F. 740, 744 (5th Cir. 1917).

The critical distinction which must be made is to see how our Plaintiffs differ from *Chesbrough* plaintiffs. The plaintiffs in this case owned their stock *before* any mismanagement by the directors destroyed the value of the stock. In *Chesbrough*, the Plaintiffs were lured into becoming stockholders by the directors' false reports. All stockholders in *Chesbrough* were not proportionately hurt by the directors' misbehavior. Only the *Chesbrough* stockholders were hurt by the false reports. In our case, all the stock lost its value because of the directors' mismanagement. Thus, only the FDIC-Receiver may now sue mismanaging directors.

Plaintiffs in this case do not fall within either of the two exceptions to this notion that would allow them to sue derivatively: (1) where they make a demand upon corporation and the corporation refuses to sue; or (2) misbehaving directors or officers have "captured the corporation so that any demand to sue would be a useless action. Plaintiffs did not plead that they had asked the corporation to bring a case against the alleged misbehaving Directors. Such an effort would have been meaningful. The FDIC was appointed as receiver for the insolvent corporation on March 16, 1984. Plaintiffs filed their original complaint two years later, on March 14, 1986. The FDIC is not related in any way to the alleged misbehaving directors. If the Directors had still been in control of the corporation at the time the Plaintiffs filed suit, then a demand upon the corporation to bring suit against the directors might have constituted a vain effort to bring the directors to justice. A suit brought while allegedly wrongful directors are still in control is essentially a derivative action. However, nothing of the sort is involved in our case. No demand was pled in this case in a situation in which doing so would have been a meaningful act.

2. Modern Era Standing Decisions in the Corporate Law Context

Modern decisions from other circuits in the corporate law standing context bolster our conclusion. *See Gaff v. Federal Deposit Insurance Corp.*, 814 F.2d 311 (6th Cir.) *reh'g on other grounds*, 828 F.2d 1145, 1146 (1987) (state law claims). Our result also accords with the Ninth Circuit's decision in *Harmsen v. Smith*, 542 F.2d 496, 502-03 (9th Cir. 1976). A cursory reading of *Harmsen* may leave the impression that it conflicts with our decision. A careful reading, however, that pays close attention to the procedural posture of Harmsen and the identity of the plaintiffs, reveals that *Harmsen* is in accordance with our result.

In *Harmsen*, two groups of minority shareholders brought class actions against the directors of a bank. 542 F.2d at 498. The FDIC moved to intervene, to substitute and to displace the minority shareholders as the Plaintiffs in the case. *Id.* The district court allowed the intervention, disallowed the displacement, and let all minority shareholders, as a class, remain in the case as individuals. The district court then certified the standing issue concerning the minority shareholders, specifically the motion by the FDIC to *displace* the minority shareholders, to the Ninth District. *Id.* The Ninth Circuit affirmed the district court's refusal to permit the FDIC's displacment of the minority shareholders as plaintiffs. The allegations in the Plaintiffs' complaint alleged that director-defendants had violated *reporting* 'requirements. The Ninth Circuit explicitly stated that "Section 93 [is] limited to such sums as will compensate such shareholder for an injury which he, as distinct from the bank, has suffered." *Id.* at 500. After referring to *Chesbrough*, the Ninth Circuit sent the case back to the district court so the district court could reevaluate the class certification of all minority shareholders. *Id.* at 503. Thus, the Ninth Circuit wanted the district court to separate *Chesbrough* plaintiffs (personal injury, direct action) from derivative plaintiffs (corporate injury, only FDIC could have brought action).[13]

We have examined the historical context in which Congress passed 12 U.S.C. § 93(a). From the context, we have learned that a general commercial law, specifically the genesis of the law of derivative suits, provides meaning to the terms of Section 93(a). Courts, before *Erie v. Tompkins*, relied on this general common law when interpreting Section 93(a). Modern courts have arrived at the same result. From all these sources, we conclude that minority shareholders who sue for "corporate" injury do not have standing to sue under Section 12 U.S.C. § 93(a), unless one of the two exeptions authorizing derivative actions applies.

B. Minority Shareholders' Standing Under RICO, 18 U.S.C. § 1964(c)

[5] Plaintiffs also argue that they have standing to assert a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c). This circuit has considered this same claim in two previous cases and has found it to be wanting.

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13. The *Harmsen* dissent, apparently believing that there was no class definition issue, argued that only corporate injury had been shown. 542 F.2d 496, 504 (Hufstedler, J., dissenting).

Plaintiffs' amended complaint alleges that Defendant directors made false representations of material facts in both annual reports and reports of comparative conditions supplied to Plaintiffs. As a direct result, Plaintiffs allege, their stock has become totally worthless in violation of RICO.

RICO's standing provision states:

> Any person *injured in his business or property* by reason of violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964 (emphasis added). Thus, to satisfy Section 1964(c), a person must allege a RICO action which tends to injure the person's "business or property." *See Sedima, S.P.R.L. v Imrex Co.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985).

This Circuit has previously addressed whether minority shareholders may maintain a RICO action against directors when their stock has lost value because of the actions of directors or officers. *Crocker v. Federal Deposit Insurance Corp.* 826 F.2d 347, 349 (5th Cir. 1987); *see also Adams-Lundy v. Ass'n of Professional Flight Attendants*, 844 F.2d 245, 250 (5th Cir. 1988). In *Crocker*, we held that minority shareholders lacked standing under RICO to sue because they had not alleged any injury to their property that was distinct from any injury the corporation may have suffered.

[6] The *Crocker* decision looked to Mississippi state law to determine if there had been any "injury" to the Plaintiffs. *Crocker*, 826 F.2d at 349. Under Mississippi law, the *Crocker* court determined, that Plaintiffs had not suffered any individual injury.[14]

Texas adheres to the general rule that a shareholder does not have a direct right of action against a director who has mismanaged the affairs of the corporation. The only right of action the shareholder has is derivative. *Commonwealth of Massachusetts v. Davis*, 140 Tex.

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14. This incorporation of state law into federal law (RICO standing in regard to shareholders) implicates a serious problem of uniformity of federal law throughout the states. However, on balance, the incorporation of state law to determine whether a shareholder has been injured under RICO is preferable to generating federal common law in this area. Any definition of the term "property," an inherently state law-related term, should look to state law. *See Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 66 S.Ct. 992, 90 L.Ed. 1172 (1946).

398, 168 S.W.2d 216, 221-22 (1942); *Cates v. Sparkman*, 73 Tex. 619, 11 S.W. 846, 848-49 (1889); *Hughes v Houston Northwest Medical Center*, 647 S.W.2d 5, 7 (Tex.Ct.App. 1982(; *Governing House v. Pannill*, 561 S.W.2d 517, 524-25 (Tex.Ct.App.1977); *Joy v. North Texas Compress & Warehouse Co.*, 151 S.W.2d 342, 343 (Tex.Ct.App.1941); *Cullum v. General Motors Acceptance Corp.*, 115 S.W..2d 1196, 1200-03 (Tex.Ct.App.1938).

Plaintiffs have not alleged as individuals any legally cognizable injuries. We therefore affirm the district court's dismissal of Plaintiffs' RICO claims.[15]

C. Plaintiffs' Federal Reserve Act Claim

[7] Plaintiffs also argue that they have standing to assert a cause of action under the Federal Reserve Act, 12 U.S.C. § 503. However, the district court, in dismissing Plainfiffs' claims, did not pass upon this cause of action because this claim was not presented to the district court. The plaintiffs did not allege this cause of action in their first admended complaint. Thus, the Defendants did not receive notice that Plaintiffs were asserting this cause of action. In addition, Plaintiffs failed to discuss this cause of action in their response brief before the district court on the motion to dismiss (R. at 455-504).

We will not deviate from the general rule that appellate courts do not pass upon issues which were not raised in the court below except where injustice might otherwise result. No exceptional circumstances exist here that would create injustice by not reaching the Federal Reserve Act issue. *Singleton v. Wulff*, 428 U.S. 106, 120-21, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976); *Hormel v Helvering*, 312 U.S. 552, 556-57, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941); *Response of Carolina, Inc. v Leasco Response, Inc.*, 537 F.2d 1307, 1324 (5th Cir. 1976). Because the Plaintiffs have improperly asserted their Federal Reserve Act cause of action on appeal, we do not reach the standing issue under 12 U.S.C. § 503.

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15. The law of this circuit is consistent with decisions of other circuits. *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 29-30 (1st Cir. 1987); *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2d Cir.), *cert. denied*, 479 U.S. 987, 107 S.Ct. 579, 93 L.Ed.2d 582 (1986); *Warren v. Manufacturers National Bank of Detroit*, 759 F.2d 542, 544 (6th Cir. 1985); *Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985).

CONCLUSION

Plaintiffs, as minority shareholders whose stock has allegedly lost value because of Defendant directors' mismanagment of the Bank, have no standing to assert causes of action under either the National Bank Act, 12 U.S.C. § 93(a), or RICO, 18 U.S.C. § 1964(c).

Shareholders such as the Plaintiffs who refuse to act through the corporate body, are like a disembodied soul that seeks to walk on the earth without organic feet. Like the Ghost of Hamlet's Father,[16] Plaintiffs seek to influence the temporal world believing themselves to be more real than the corporate body itself. We will not permit bodyless souls to wander the earth and complain of injury. While the body may stand before a court and complain of its ills, representing the whole being (body and soul), a restless and possibly greedy soul may only do so when the body is either catatonic or has been captured by mutant viruses. In such situations, we will create feet of clay, thereby allowing the soul to stand before us either when the corporate body refuses to stand itself (when a demand is made upon the corporation and the corporation refuses to sue the misbehaving directors) or when the corporate body has become possessed by the illness (when misbehaving directors control the corporation, and a demand to sue would be a vain action).

This case is not, and does not resemble, such exceptional cases. Therefore, the judgment of the district court is

AFFIRMED.

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16. *Hamlet*, Act I, Scene V.

JUDITH DIANE DUFF LEACH, *etc., et al.*,
Plaintiffs - Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, *et al.*,
Defendants - Appellees.

No. 87-1921.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Jan. 3, 1989.

ON PETITION FOR REHEARING

Before Goldberg, Higginbotham and Davis, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

(s) Patrick Higginbotham

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Civil Action No. C.A.-5-86-67

JUDITH DIANE DUFF LEACH, *et al.*,
Plaintiffs

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, *et al.*,
Defendants.

MEMORANDUM AND ORDER

Statement of the Case

Plaintiffs are suing defendants to recover damages to plaintiffs allegedly caused by action of defendants bank officers and directors, including conspiracy, violations of applicable banking laws, and breach of fiduciary duty owed by the officers and directors to plaintiffs. Plaintiffs allege that defendants have each violated one or more of several laws of the United States. Therefore, this court has jurisdiction to hear this case under 18 U.S.C. § 1964 and 28 U.S.C. § 1331.

Plaintiffs' claim for damages is that the shares of stock of Seminole State National Bank, as a direct result of defendants' wrongful conduct, have become totally worthless. Plaintiffs' Amended Complaint, pages 24-25. Plaintiffs allege that the stock became worthless because of the defendants' wrongful conduct toward plaintiffs. Plaintiffs' Reply to Federal Deposit Insurance Corporation's Motion to Reconsider, page 5.

Motions Pending Before the Court

1. Defendants Richard Watts, S.H. Hart and Kenneth Newcomb's Reurged Motion to Dismiss;
2. Defendant Federal Deposit Insurance Corporation's (hereafter "FDIC") Reurged Motion to Dismiss per *Crocker;* and
3. Defendant MBank Dallas' Motion to Dismiss.

A. Plaintiffs' Position

Plaintiffs allege that defendants bank officers and directors and defendant MBank Dallas participated in improper financing schemes that injured plaintiffs. Plaintiffs' Amended Complaint, pages 13-24. Plaintiffs allege that this action arises under the Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations Act (hereafter RICO), 18 U.S.C.A. §§ 1961 *et seq.* (West 1984) (West Supp. 1987), and under 12 U.S.C.A. § 93 (a) (West Supp. 1987).

Plaintiffs seek $180,000 as damages for the worthless stock, treble damages under 18 U.S.C.A. § 1964(c), and attorneys' fees. Amended Complaint, page 25. (West 1984).

B. Defendants' Positions

Defendants claim that plaintiffs have no standing to sue, because the action asserted by plaintiffs is allegedly a derivative action that belongs to FDIC as receiver of the failed bank. Defendants move to dismiss under Fed. R. Civ. Pro. 12 (b)(6), 12 (b)(1), and 9 (b).

Discussion

A. Defendant Federal Deposit Insurance Corporation

Plaintiffs' allegations concern alleged wrongdoing by the officers and directors of the failed bank, by MBank Dallas, and the FDIC is sued in its capacity as receiver of the failed bank. Amended Complaint, pages 10-25. Brief Supporting Federal Deposit Insurance Corporation's Motion to Dismiss, page 2. In order to state a direct, personal injury distinct from that suffered by the corporation that would permit plaintiffs to maintain an individual cause of action that does not belong to FDIC as receiver of the bank, plaintiffs are required to allege some injury other than a decline in the value of the bank stock. *Crocker v. Federal Deposit Ins. Corp.*, 826 F.2d 347, 352 (5th Cir. 1987). Plaintiffs have not met this burden. Therefore, defendant Federal Deposit Insurance Corporation's Reurged Motion to Dismiss per *Crocker* shall be granted with prejudice.

B. Defendants Dwayne Herman, Richard Watts, S.H. Hart, Sr., Kenneth Newcomb, M.E. Bridges, B.C. Clark, Walker Dearing, Jr., D.G. Hoffman, C.D. Wickson, Jr., Carroll Haralson, Alton Freeman, Reeves Cothes, Dr. Joe Cauley, R.D. Skelton, George Shivers and Paul Condit.

A shareholder may bring a direct action against a director violating provisions of 12 U.S.C. Chapter 2. 12 U.S.C. § 93(a) (West. Supp. 1987).

Chesbrough v. Woodworth, 244 U.S. 72, 77, 61 L.Ed. 1000, 1004 (1917). Plaintiffs allege that sections of Chapter 2 that were likely violated include: §§ 56, 60, 73, 83, 84, 92, and 161. A shareholder may bring individual action if the injury is peculiar to that shareholder, or a specific group of shareholders. *Empire Life Ins. Co. v. Valdak Corp.*, 468 F. 2d 330, 336 (5th Cir. 1972).

Diminution in value of the stock of a corporation is insufficient direct harm to give the shareholder standing to sue in his own right. *Stevens v. Lowder*, 643 F.2d 1078, 1080 (5th Cir. 1981). *Shaffer v. Universal Rundle Corp.*, 397 F.2d 893, 896 (5th Cir. 1968). *Crocker v. Federal Deposit Ins. Corp.*, 826 F.2d 347, 350-51 (5th Cir. 1987). Plaintiffs must allege some injury other than a decline in the value of the bank stock in order to state a direct a direct, personal injury distinct from that suffered by the corporation that would permit them to maintain an individual cause of action. *Id.*, at 352.

C. Defendant MBank Dallas

Plaintiffs' allegations against defendant MBank center around the financing arrangements of defendant MBank with the Spikes Easy Money Financial Group and First Seminole Bancshares, Inc. Plaintiffs allege that the various loan documents gave defendant MBank the rights to determine who would be officers and directors of the groups, conduct examinations and audits, and to have dividends paid in order to service debts to defendant MBank. Amended Complaint, pages 5-13. Plaintiffs specifically allege that defendant MBank conspired with other defendants and engaged in loan participations which left the failed bank with only poor quality assets and benefited defendant MBank. Amended Complaint, page 9-10. Plaintiffs allege that defendant MBank's actions including engaging in loan participations with the failed bank, in demanding dividends to reduce indebtedness to defendant MBank, in soliciting and encouraging infusions of capital, affected the Spikes Easy Money Financial Group and allowed the group scheme to continue. Amended Complaint, pages 12-13.

However, once again, plaintiffs must allege some injury other than a decline in the value of the bank stock in order to state a direct, personal injury distinct from that suffered by the corporation that would permit them to maintain an individual cause of action that does not belong to FDIC as receiver of the failed bank. *Crocker v. Federal Deposit Ins. Corp.*, 826 F.2d 347, 352 (5th Cir. 1987). Plaintiffs have not met this burden.

Conclusion:

Under the preceding authorities, it appears that plaintiffs must be able to show other damages than the diminution of value of stock in order to bring a direct action. It is not clear to the court whether there exist other damages in this case than the loss of value of plaintiffs' stock.

Therefore, it is ORDERED, ADJUDGED, and DECREED that:

1. The motion of FDIC to dismiss is granted and the cause of action against this defendant is dismissed with prejudice.
2. The claim of the plaintiffs against all of the defendants under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et seq.*, is dismissed with prejudice.
3. Permission is granted to plaintiffs to file an amended complaint against all of the defendants except FDIC, alleging any cause of action that plaintiffs might have against said defendants under 12 U.S.C. § 93(a) as well as any cause of action or claim the plaintiffs might have against the defendants (other than FDIC) for damages sustained other than diminution of the value of their stock as prohibited by *Crocker v. Federal Deposit Ins. Corp.*, 826 F.2d 347 (5th Cir. 1987).
4. Relief prayed for by the defendants in their respective motions is denied except as ordered above.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 15th day of October, 1987.

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Civil Action No. C.A.-5-86-67

JUDITH DIANE DUFF LEACH, *et al.*,
Plaintiffs

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, *et al.*,
Defendants.

ORDER

By Order of this court entered October 16, 1987, the Federal Deposit Insurance Corporation was dismissed from this action, RICO claims against all defendants were dismissed, and plaintiffs were given an opportunity to file an amended complaint against all of the defendants other than the FDIC alleging any cause of action not obviated by *Crocker v. FDIC*, 826 F.2d 347 (5th Cir. 1987). Plaintiffs having been able to discover no such cause of action, it is the order of this court that the above-numbered and styled case be dismissed.

It is therefore ORDERED, ADJUDGED and DECREED that this action is dismissed.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 24th day of November, 1987.

(s) Halbert O. Woodward

Senior United States District Judge

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Civil Action No. C.A.-5-86-67

JUDITH DIANE DUFF LEACH, *et al.*,
Plaintiffs

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, *et al.*,
Defendants.

JUDGMENT OF DISMISSAL

The defendant, Federal Deposit Insurance Corporation, has reurged its motion to dismiss the complaint of plaintiffs and the court has considered said motion as well as all briefs filed herein and it is the opinion of the court that the following judgment should be entered:

It is therefore ORDERED, ADJUDGED and DECREED that the cause of action and complaint filed by the plaintiffs in the above-entitled and numbered cause against the Federal Deposit Insurance Corporation be and the same is hereby dismissed with prejudice.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 16th day of October, 1987.

(s) Halbert O. Woodward

Senior United States District Judge

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Civil Action No. C.A.-5-86-67

JUDITH DIANE DUFF LEACH, *et al.*,
Plaintiffs

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, *et al.*,
Defendants.

JUDGMENT

This action came on for consideration before the court, the Honorable Halbert O. Woodward, Senior District Judge, presiding, and the issues having been duly considered and a decision having been rendered,

It is Ordered and Adjudged that plaintiffs take nothing of and from the defendants and that this action be dismissed.

The Clerk will furnish a copy hereof to each attorney of record.

ENTERED this 24th day of November, 1987.

(s) Halbert O. Woodward

Senior United States District Judge

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Civil Action No. C.A.-5-86-067

JUDITH DIANE DUFF LEACH, *et al.*,
Plaintiffs

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, *et al.*,
Defendants.

PLAINTIFFS' FIRST AMENDED ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiffs, JUDITH DIANE DUFF LEACH, INDIVIDUALLY AND AS NEXT FRIEND OF HER MINOR CHILD, JEREMIAH CHRISTOPHER DUFF LEACH, AND AS PERSONAL REPRESENTATAIVE OF THE ESTATE OF ARTHUR JAMES DUFF; and TED E. DUFF, INDIVIDUALLY, by and through their attorneys, Hinkle, Cox, Eaton, Coffield & Hensley, and as and for their Complaint against Defendants, SEMINOLE STATE NATIONAL BANK, A NATIONAL BANKING ASSOCIATION; B.C. CLARK; PAUL CONDIT: WALKER DEARNING, JR.: SWAYNE HERMAN: LEWIS NANCE: W.J. PAUL; RONNIE THOMAS; D.G. HOFFMAN; C.D. WICKSON, JR.; CARROLL HARALSON; ALTON FREEMAN; DOREEN ALLEN; REEVES COTHES: SAM SPIKES; GEORGE SHIVERS; DR. JOE CAULEY; MBANK DALLAS, FORMERLY MERCANTILE NATIONAL BANK OF DALLAS; RICHARD WATTS; S.H. HART, SR.; KENNETH NEWCOMB; CONNIE WILLIFORD; R.D. SKELTON, SR.; and FIRST WEST FINANCIAL VENTURES, would show this Court as follows:

JURISDICTION AND VENUE

1. This is an action under 18 U.S.C. § 1961, et seq. (the Racketeer Influenced and Corrupt Organizations Act, or RICO Act), § 18 U.S.C. §§ 656, 1014, and 12 U.S.C. §§ 84 and 161. This Court has jurisdiction of the action under 18 U.S.C. § 1964 and 28 U.S.C. § 1331. Venue is proper pursuant to 12 U.S.C. § 94.

PARTIES

2. Plaintiff Judith Diane Duff Leach, Individually and as Next Friend of Her Minor Child Jeremiah Christopher Duff Leach and as Personal Representative of the Estate of Arthur James Duff, Deceased, is a citizen of the State of New Mexico. Ted E. Duff is a citizen of the State of Texas. These parties own approximately 3,300 shares of stock in the Seminole State National Bank ("SSNB" herein). Although not a party to this case, United New Mexico Trust Company ("UNMT") was the Trustee of the A.L. Duff, Jr. Trust, and acquired approximately 3,000 shares of the SSNB stock after the death of Arthur L. Duff, Jr. in 1979. After the initiation of this litigation in 1986, due to a conflict of interest with Defendant MBank Dallas, United New Mexico Trust Company distributed the 3,000 shares of stock of SSNB to the named Plaintiffs, who now prosecute this matter in their own names.

3. Defendant Seminole State National Bank ("SSNB" herein), was declared insolvent on March 16, 1984, and the Federal Deposit Insurance Corporation was appointed Receiver. Service of process may be had by service upon Donald B. McKinley, Regional Counsel (Liquidation), Federal Deposit Insurance Corporation, 1910 Pacific, Suite 700, Dallas, Texas 75201.

The following are referred to herein as the Director Defendants:

Defendant B.C. Clark is an individual residing at 407 Avenue "I" S.W., Seminole, Texas 79360.

Defendant Walker Dearing, Jr. is an individual residing at 406 S.W. 14th Street, Seminole, Texas 79360;

Defendant Dwayne Herman is an individual residing at Seminole, Texas 79360;

Defendant Lewis Nance is an individual residing at Frankel City Highway, Seminole, Texas 79360;

Defendant W. J. Paul is an individual residing at Frankel City Highway, Seminole, Texas 79360;

Defendant Ronnie Thomas is an individual residing at Grapevine, Texas;

Defendant D.G. Hoffman is an individual residing at 613 S. W. 19th Street, Seminole, Texas 79360;

Defendant C.D. Wickson, Jr., is an individual residing at 103 S. Main Street, Seminole, Texas 79360;

Defendant Carroll Haralson is an individual residing at 2110 Avenue "B" N.W., Seminole, Texas 79360;

Defendant Alton Freeman is an individual residing at 900 Avenue "D" S.W., Seminole, Texas 79360;

Defendant Reeves Cothes is an individual residing at 409 Avenue "E", S.W., Seminole, Texas 79360;

Defendant Sam Spikes is an individual residing in Houston, Texas; and

Defendant George Shivers is an individual residing at 603 S. W. 14th Street, Seminole, Texas 79360.

Defendant MBank Dallas, formerly Mercantile National Bank of Dallas, is a National Banking Association doing business in Dallas, Texas, whose President is James B. Gardner, 1704 Main, Dallas, Texas 75201.

Defendant First West Financial Ventures is a Texas Joint Venture and may be served by service upon Defendant Sam Spikes.

The following persons are referred to herein as the Officer Defendants:

Defendant Joe Cauley is an individual residing at 711 11th Street, Seagraves, Texas;

Defendant Doreen Allen is an individual residing in Seminole, Texas;

Defendant Richard Watts is an individual residing at 300 Southwest 19th Street, Seminole, Texas 79360;

Defendant Defendant S.H. Hart, Sr. is an individual residing at Lamesa Highway, Seminole, Texas 79360;

Defendant Kenneth Newcomb is an individual residing at 509 S.W. 18th Street, Seminole, Texas 79360;

Defendant Connie Williford is an individual residing at 607 S.W. 20th Street, Seminole, Texas 79360;

Defendant R.D. Skelton, Sr. is an individual residing at Seagraves Highway, Seminole, Texas 79360.

FACTS

4. On or about September 5, 1940, SSNB was issued its original State Bank Charter, taking as its name Seminole State Bank. Subsequently, the Bank converted its State Charter to a National Charter on May 19, 1982, and thereafter the Bank was known as Seminole State National

Bank. On or about March 16, 1984, the Office of the Comptroller of the Currency declared SSNB insolvent, and appointed the Federal Deposit Insurance Corporation, Receiver of the failed bank's assets and liabilities.

5. Sam Spikes came to the Seminole State Bank in 1972, joining the Bank as an officer. Spikes was a former National Bank Examiner. The Bank was subsequently purchased by Spikes and a group of local Seminole individuals who eventually became directors of the Bank. Spikes and these individuals formed a bank holding company in 1979, known as First Seminole Bancshares, Inc. ("FSB" herein). Purchase money indebtedness had been incurred by Spikes and other local purchasers of the Bank. This purchase money indebtedness was assumed on transfer of the Bank stock held by the Spikes group to First Seminole Bancshares, Inc. The purchase money assumption financing was furnished by Defendant, MBank Dallas, in the approximate amount of $2.3 million, with approximately 91% of the Bank Stock pledged as collateral. The loan documents gave MBank Dallas the right to determine who the officers and directors of SSNB would be. MBank Dallas had the right to examine and conduct audits of the books and records of the Bank. Additionally, the loan documents required that MBank Dallas be furnished with quarterly reports of condition of the Bank, and such other reports as were deemed necessary by that entity. Lastly, MBank Dallas required that dividends be paid in order to service FSB's debt to it.

6. Spikes and another group of investors (some of whom were also shareholders in SSNB and FSB) acquired control of Brownfield State Bank and Trust, ("BSBT") Brownfield, Texas. A one-bank holding company, Brownfield Bancshares, Inc., ("BBI") was formed in 1980. Spikes and these investors then transferred most of their stock in the Bank to BBI. With approximately 90% of the stock of BSBT pledged as collateral, MBank Dallas provided $2.75 million in loans for this acquisition and set up of BBI. The loan documents gave MBank Dallas the right to determine who the officers and directors of BSBT would be. Additionally, the loan documents granted MBank Dallas the right to conduct examinations and audits of the Bank's books and records. Further BSBT was to furnish quarterly reports of condition of the Bank, and such other reports as were deemed necessary. Lastly, MBank Dallas required that dividends were to be paid in order to service the holding company debt.

7. In 1979 Spikes and a group of Snyder, Texas investors applied for and received a national bank charter for the First National Bank of Snyder, Texas ("FNBS"). Upon obtaining approval for the charter, FNBS opened in 1981. MBank Dallas financed aproximately $875,000 of the sums needed for this bank. Upon information and belief, the loan documents granted MBank Dallas the right to conduct audits and examinations of the Bank's books and records. Further, FNBS was to furnish quarterly reports of condition and such other reports as were required. Lastly, MBank Dallas required that dividends were to be paid in order to service this indebtedness owed to MBank Dallas.

8. Spikes and another group of investors, some of whom were shareholders in SSNB (and its parent FSB), BSBT (and its parent BBI), and FNBS acquired control of Security National Bank of Lubbock, Texas ("Security") in 1981. This acquisition was financed by MBank Dallas through loans to Sam Spikes, as Trustee, in the approximate amount of $8.4 million. Pledging 90% of the Bank Stock as collateral, the loan documents gave MBank Dallas the right to determine who the officers and directors of the Bank would be. Additionally, the loan documents granted MBank Dallas the right to conduct audits and examinations of the Bank's books and records. Further, Security was to furnish quarterly reports of condition and such other reports as were required. Lastly, MBank Dallas required that dividends were to be paid in order to service this acquisition indebtedness.

9. In 1981, Spikes formed a consulting entity known as West Texas Consulting, Inc. This entity eventually became known as First West Financial Corporation in 1982. At that time, Spikes and the Director and Officer Defendants caused SSNB and BSBT to extend credit to many of the Director Defendants to purchase stock in First West. In the same year, Spikes and the Director Defendants caused First West to contract with SSNB for "Management Services" and the use of an airplane. Spikes also caused First West to provide such services to BSBT and Security. Financing for the airplane, owned by or leased to First West, was provided by MBank Dallas. In 1982, SSNB paid First West over $85,000 for such services and the use of the airplane. Security paid approximately $66,000, and BSBT a similar amount, all of which benefited Spikes and the Director Defendants at the sole cost and expense of shareholders such as Plaintiffs.

10. Further, in 1982, Spikes and the Director Defendants caused SSNB to extend credit to First West Financial Corporation on an unsecured basis. Eventually, that same year, First West borrowed $2 million form SSNB, BSBT, Security, and FNBS. First West's assets included stock in Security, FNBS, and EDSCO Drilling Co. (owned by Jack and Sam Spikes, and Defendant, Paul Condit). First West also owned a tract of land in Lubbock which became a building site for Security. During the course of an FDIC examination conducted in November and December 1982, Spikes caused First West Ventures, Inc., a subsidiary of First West Financial, to be formed solely for the purpose of purchasing approximately $1.62 million in classified loans from BSBT. This action concealed the true financial picture of BSBT from federal regulators. All of these First West assets had no or relatively little value at the time extensions of credit were granted by SSNB and the Director Defendants.

11. In the fall of 1982, BSBT owned, with SSNB, an agricultural financing entity known as Plainsman Agricultural Credit Corporation. BSBT was in such poor financial condition, (although MBank Dallas had extended additional credit of over $1 million to raise capital, knowing of its inadequate capital and provisions for loan losses), that Spikes caused SSNB to purchase the 80% of Plainsman that SSNB did not own for a purchase price of over $1.2 million. Spikes and the Defendant directors and officers caused SSNB to purchase Plainsman although Spikes knew, and the other Director Defendants were in a position to know, or had reason to know, of the extremely poor financial condition of Plainsman. At the time of transfer, over 90% of Plainsman's loans were subject to credit weaknesses.

12. In 1981, 1982, and 1983, Spikes and the Director Defendants caused SSNB to extend credit on financial statements of the director Defendants and officers of Spikes-related Banks which financial statements listed stock in such banks as assets. Plaintiffs would show that at the time the loans were made such bank stocks were virtually worthless, and certainly were not worth the values listed thereon by these borrowers. These Defendants did nothing to cause an evaluation of these assets to be made to ascertain realistic values for such assets. MBank Dallas participated in a number of such loans.

13. All of the Spikes Banks and MBank Dallas engaged in the practice of loan participations, ostensibly for the purpose of aiding in liquidity. As early as 1980, federal regulators warned SSNB against this practice. Ignoring this repeated warning, the Director Defendants, in 1981, 1982, and 1983, aided by MBank Dallas, continued to sell off large numbers of "good" credits of SSNB to other Spikes banks and MBank Dallas to help project an image of rapid growth. SSNB was left with assets of poor quality and was forced to expend managment time to supervise participated credits when there was little or no income left for SSNB. Additionally, SSNB was forced to take participated credits where the line of credit was already classified, and where the participation was structured solely for the benefit of other upstream banks such as MBank Dallas.

14. Plaintiffs are informed and believe, and on information and belief allege, that the Defendants who were officers and directors of SSNB failed to properly manage the business matters of the bank; made imprudent loans; violated lending limits; failed to require adequate collateral for such loans; and failed to timely and adequately respond to the requests and demands of the Comptroller of the Currency and the Federal Bank Examiners.

15. Plaintiffs further allege on information and belief that Defendant SSNB and and the individual Defendants named herein, as officers and directors of the Bank, failed to timely and properly advise Plaintiffs of the financial condition of the Bank as they knew it to be and as disclosed to them by the Comptroller of the Currency and Federal Bank Examiners. Such action prohibited UNMT and Plaintiffs from utilizing their own judgment with respect to the true value of the common stock of SSNB, misled UNMT and Plaintiffs as to the true condition of the Bank's solvency, and made it impossible for UNMT and Plaintiffs to judiciously determine whether or not it should elect to retain or sell such stock for the benefit and protection of the beneficiaries.

16. Plaintiffs would show that from 1981 until 1983, SSNB and the Defendant Officers and Directors, through misrepresentations (as to the financial status of the Bank on each occasion dividends were paid) paid dividends to its shareholders, and principally to its majority shareholder (FSB) in order to service its debt requirement to MBank Dallas while the payment of such dividends was negligent and imprudent, and the Bank was otherwise unable to pay such dividends.

17. Plaintiffs further allege that on or about July 20, 1983, that Defendant SSNB and those Defendants who are officers and directors of Defendant SSNB further failed to file or furnish true and accurate reports of condition of the Bank with all shareholders and Bank Regulatory Agencies so as to keep them properly advised as to the true financial condition of the Bank, and in fact caused the publication of false reports as to loan losses and reserves for same.

18. Upon information and belief, Plaintiffs allege that Director Defendants of SSNB were also controlling or majority shareholders in the FSB, and acted for their own account and benefit in such actions.

19. Plaintiffs are informed and believe that in September 1983, Federal Bank examiners demanded that an additional infusion of Four Million Dollars ($4,000,000.00) capital be made to the Bank to cover existing loan losses. This material event was not reported to Plaintiffs as shareholders, and further caused Plaintiffs to continue to rely on and believe in the financial soundness of the Bank.

20. Plaintiffs are informed and believe that in September, 1983, the Federal Bank examiners and the Comptroller of the Currency issued negative evaluations of the Bank which were not disclosed to Plaintiffs by the Defendant Directors or Officers. These constituted material events which should have been reported to Plaintiffs as shareholders. That same month a change in the majority control of SSNB involving certain Director Defendants took place but notice of such transaction was not furnished to Plaintiffs prior to or after the change in control took place.

21. Plaintiffs are informed and believe that Defendant SSNB paid dividends when the officers and directors knew of the poor financial condition and insolvency of the Bank, thus benefiting the major shareholders who were insiders, officers or directors of the Bank or their affiliates, and in particular MBank Dallas.

22. Plaintiffs are informed and believe that in 1982 and 1983, that BSBT, through its officers and directors including Defendant Spikes, and with the consent and approval of the Defendant Directors, transferred what were possible bad or doubtful loans and assets to various other Banks, including Defendant SSNB, or made sales of such loans to third parties to mislead FDIC Bank examiners and the Comptroller of the Currency in their examination of the respective Banks. As a direct result, the Defendant Directors burdened SSNB with yet more bad assets, causing yet more loss to occur to SSNB.

23. Plaintiffs would show that the conduct of MBank Dallas in engaging in loan participations with SSNB, in demanding reductions of indebtedness in the form of dividends from SSNB, in soliciting and encouraging continued infusions of capital, in financing stock sales to various Defendants, in rendering financial advice regarding SSNB and consultation on dealing with the Comptroller of the Currency to various Defendants, in fact concealed the true financial condition of SSNB from Plaintiffs when MBank Dallas knew of the fraud and mismanagement perpetrated by Defendants and helped to conceal it by its actions so as to attempt to prevent losses to itself. Such conduct by MBank Dallas affected the Spikes Easy Money Financial Group, as defined below, in that such actions allowed the Group to continue its scheme and/or conspiracy to defraud and/or breach of fiduciary duties owed to the minority shareholders, such as Plaintiffs, as more specifically pled hereafter.

24. In February of 1984, the Texas Banking Commissioner declared BSBT insolvent and appointed the Federal Deposit Insurance Corporation as its Receiver. Subsequently in March 1984, SSNB, FNBS, and Security were all declared insolvent by the office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation was appointed Receiver of these institutions.

COUNT I

25. Plaintiffs adopt and incorporate all of the allegations of paragraphs 4-24, and further show that at all material times, the Defendants engaged in the existence of an enterprise, namely the Spikes Easy Money Financial Group, which consisted of the Defendants named herein, and those Spikes banks not yet parties to this case, BSBT, Security, and FNBS. This enterprise was engaged in interstate commerce. Of this group, the Defendants were either agents, directors,

officers, employees, affiliates, or such Defendants, including MBank Dallas, BSBT, FNBS, and Security, were associated with such enterprise. These Defendants either directly or indirectly participated in the conduct of the enterprises' affairs through a pattern of racketeering activity.

In this regard Plaintiffs would show that the Defendant Directors in 1981, schemed and/or conspired to defraud and/or breach fiduciary duties owed to Plaintiffs and used the United States Mail in furtherance of such scheme and/or conspiracy. Additionally, Plaintiffs would show that the Director Defendants used telephone and/or other wires in furtherance of such scheme and/or conspiracy. In particular, Plaintiffs show as follows:

a. On or about February 19, 1981, the annual stockholder's meeting was held, and shortly thereafter the Defendant Directors caused the mailing of the 1980 Annual Report to Shareholders. Such Annual Report was false and misleading, omitting material information in the following respects:

   (1) Such Annual Report failed to disclose the relationship of Defendant Spikes to BSBT;

   (2) Such Annual Report failed to disclose the relationshp of the remaining Defendant Directors to BSBT;

   (3) Such Annual Report failed to disclose the loan participations purchased from BSBT;

   (4) Such Annual Report failed to disclose the loan participations sold to BSBT; and

   (5) Such Annual Report failed to disclose the loan participations sold by MBank Dallas to SSNB.

b. On or about June 10, 1981, the Defendant Directors declared a dividend of $1.00 per share to SSNB Stockholders of Record as of June 1, 1981. On or about September 16th, the Defendant Directors declared a dividend payable to SSNB Stockholders of Record of September 4, 1981. Further, on or about December 9, 1981, the Defendant Directors declared a dividend of $1.00 per share to SSNB Stockholders of Record as of November 30, 1981. Shortly thereafter on each occasion, such dividend payments were mailed to Plaintiffs. The payment of such dividends was false, misleading, and breached fiduciary duties owed to Plaintiffs in the following respects:

(1) The payment of dividends misled Plaintiffs into believing that the capital and earnings position of SSNB was sufficient against reserves for possible loan losses, when in truth and in fact, such reserves for possible loan losses were inadequate.

(2) The payment of dividends breached fiduciary duties owed to Plaintiffs in that the directors should have retained earnings, thereby having funds available to increase the capital of SSNB, rather than reducing FSB indebtedness owed MBank Dallas.

c. Plaintiffs relied upon these annual reports and the appearance of financial soundness created by the payment of dividends to their great loss, detriment, and damage as will be more specifically pled hereafter.

COUNT II

26. Plaintiffs further adopt and incorporate all of the allegations of Paragraphs 4-24, and in particular ¶25, further show that the Defendant Directors in 1982 schemed and/or conspired to defraud and/or breach fiduciary duties owed to Plaintiffs and used the United States mail in furtherance of such scheme and/or conspiracy. Additionally, Plaintiffs would show that the Defendant Directors and MBank Dallas used the United States mail, and/or telephone and/or other wires in furtherance of such scheme and/or conspiracy. In particular, Plaintiffs show as follows:

a. On or about February 17, 1982, the annual meeting of stockholders of SSNB was held, and shortly thereafter, Defendant Directors caused the mailing of the 1981 Annual Report to shareholders. Such Annual Report was false and misleading, omitting material information, in the following respects:

(1) Such Annual Report failed to disclose the relationship of Defendant Spikes to BSBT;

(2) Such Annual Report failed to disclose the relationship of the remaining Defendant Directors to BSBT;

(3) Such Annual Report failed to disclose the loan participations purchased from BSBT;

(4) Such Annual Report failed to disclose the loan participations sold to BSBT, Security, and FNBS, and

(5) Such Annual Report failed to disclose the loan participations sold by MBank Dallas to SSNB.

b. On or about June 9, 1982, the SSNB Defendant Directors declared a dividend of $1.00 per share. Further, on or about September 15, 1982, these Defendant Directors declared a dividend of $1.00 a share to stockholders of record on September 4, 1982. Lastly, on or about December 15, 1982, the SSNB Defendant Directors declared a dividend of $.50 per share, payable to shareholders of record on December 15, 1982. Shortly thereafter on each such occasion, dividend payments were mailed to Plaintiffs. The payment of such dividends was false and misleading, and breached fiduciary duties owed to Plaintiffs in each of the following respects:

(1) The payment of dividends misled Plaintiffs into believing that the capital and earnings position of SSNB was sufficient against possible loan losses, when in truth and in fact, such reserves of loan losses were inadequate;

(2) The payment of dividends breached fiduciary duties owed to Plaintiffs in that the Defendant Directors should have retained earnings, thereby having funds available to increase the capital of SSNB, rather than reducing FSB indebtedness owed MBank Dallas.

c. Plaintiffs relied upon the annual reports and the representations contained therein, and the appearance of financial soundness created by the payment of dividends to their great loss, detriment, and damage as will more specifically pled hereafter.

COUNT III

27. Plaintiffs further adopt and incorporate all of the allegations of paragraphs 4-26, and in particular paragraph 25, and further show that the Defendant Directors in 1983 schemed and/or conspired to defraud and/or breach fiduciary duties owed Plaintiffs and used the United States Mail in furtherance of such scheme and/or conspiracy. Additionally, Plaintiffs would show that the Defendant Directors and MBank Dallas used the United States Mail and/or telephone and/or other wires in furtherance of such scheme and/or conspiracy. In particular, Plaintiffs show as follows:

a. On or about March 9, 1983, the SSNB Defendant Directors declared a dividend of $1.00 per share to Stockholders of Record as of March 1, 1983. Additionally, on July 13, 1983, these Defendant Directors declared a dividend of $1.00 per

share to Stockholders of Record as of March 1, 1983. Shortly thereafter on each occasion, such dividend payments were mailed to Plaintiffs. The payment of such dividends was false and misleading, breaching fiduciary duties owed to Plaintiffs in the following respects:

(1) The payment of dividends misled Plaintiffs into believing that the capital and earnings position of SSNB was sufficient against reserves for possible loan losses, when, in truth and in fact, such reserves for loan losses were wholly inadequate;

(2) The payment of dividends breached fiduciary duties owed Plaintiffs in that the Defendant Directors should have retained earnings, thereby having funds to increase the capital of SSNB, rather than reducing FSB indebtedness owed MBank Dallas.

b. On or about March 9, 1983, the Defendant Directors held an annual Stockholder's meeting, and shortly thereafter mailed the 1982 Annual Report to Shareholders. Such Annual Report was false and misleading, omitting material information in the following respects:

(1) Such Annual Report failed to disclose the relationship of the Defendant Directors to First West Financial Corporation;

(2) Such Annual Report failed to disclose the borrowing relationship of First West Financial Corporation with SSNB;

(3) Such Annual Report failed to disclose the relationship of Defendant, Spikes specifically to BSBT, FNBS, and Security;

(4) Such Annual Report failed to disclose the specific lending participations by and between SSNB, BSBT, FNBS, Security, and/or MBank Dallas; and

(5) The Defendant Directors failed to disclose that a capital injection of over $3 million was contemplated before August of 1983 in order to cover loan losses.

Plaintiffs relied upon the annual reports and the representations contained therein, and the appearance of financial soundness created by the payment of dividends, to their great loss, detriment, and damage as will be pled more specifically hereafter.

COUNT IV

28. Plaintiffs adopt and incorporate all of the allegations contained in paragraphs 4-27, and in particular paragraph 25, and further show that on or about July 20, 1983, the Defendant Directors and Officers schemed and conspired to defraud and/or breach fiduciary duties owed Plaintiffs, and used the United States mail in furtherance of such scheme or sonspiracy on at least two (2) occasions. In particular, Plaintiffs show as follows:

a. SSNB was required by law to file with the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, at each regulatory agency's office certain quarterly Reports of Condition and Reports of Income. the Defendant Directors and Officers caused the filing of false and misleading Reports of Condition and Reports of Income with each of these agencies. These Reports were false and fraudalent in the following respects:

(1) The Reports only showed allowances for possible loan losses in the amount of $420,000;

(2) SSNB's books and records indicated that allowance for possible loan losses should have been $2.8 million;

(3) The Defendant Directors and Officers knew of the falsity but also permitted the local newspaper in Seminole to publish these fraudulent figures.

b. Shortly thereafter, the Defendant Directors and Officers while knowing of the foregoing, published a Comparative Statement of Condition for the periods ending June 30, 1983 and June 30, 1982, respectively, showing the June 30, 1983 allowance for possible loan losses to be the $420,000 sum falsely listed in the Reports of Income and Condition referred to herein. The Defendant Directors and Officers mailed such Comparative Statement of Condition to Plaintiffs, knowing of the falsity regarding possible loan losses contained therein.

c. Plaintiffs relied upon these reports and the Comparative Statement of Condition to their great loss, detriment and damage as will be more specifically pled hereafter.

COUNT V

29. Plaintiffs adopt and incorporate all of the allegations contained in paragraphs 4-28, and in particular paragraph 25, and further show that in 1981, 1982, and 1983, the Defendant Directors and Officers schemed and/or conspired to breach fiduciary duties owed to Plaintiffs, and used the United States mail and/or telephone and/or other wires in furtherance of such scheme and/or conspiracy. In particular, Plaintiffs show as follows:

    a. Defendants Sam Spikes, Bobby C. Clark, Reeves Cothes, Carroll Haralson, D.G. Hoffman, and other directors including Frank Ratliff, John Shepherd, and Delbert Warren obtained extensions of credit from SSNB using financial statements which listed these Defendants as owning stock in First West Financial Corporation. Plaintiffs would show that such stock was relatively worthless at the time of the initial extensions of credit from SSNB and continued to deteriorate although additional extensions or renewals of indebtedness were requested by these Defendants. The Defendant Directors and Officers approved these extensions and renewals of indebtedness and knew that such stock had no or relatively little value. The Defendant Directors and Officers did nothing to cause an evaluation of this stock to ascertain whether the values listed for such stock were realistic. These financial statments were furnished to SSNB in violation of the RICO Act and 18 U.S.C. §§ 656 and 1014.

    b. Defendant Sam Spikes, Paul Condit, George Shivers, Bobby C. Clark, Walker Dearing, Reeves Cothes, Richard Watts, Dwayne Herman, Carroll Haralson, D.G. Hoffman, Lewis Nance, and other directors including Frank Ratliff, John Shepherd, Delbert Warren, and James Phillips, obtained extensions of credit and renewals thereof from SSNB using financial statements which listed stock ownership in Spikes-related banks, including BSBT, FNBS, and Security. Plaintiffs would show that at the time of the extension of credit and any renewal thereof to these Defendants, such stock had no or relatively little value. The Defendant Directors and officers did nothing to ascertain whether the values listed for said stock were realistic. These financial statements were furnished to SSNB in violation of the RICO Act 18 U.S.C. §§ 656 and 1014.

    c. Plaintiffs would show that they have suffered damages approximately caused by the acts of the Defendants herein alleged, all of which will be more specifically pled hereafter.

COUNT VI

30. Plaintiffs adopt and incorporate all the allegations of paragraphs 4-29, and in particular paragraph 25, and further show that in 1981, 1982, and 1983 the Defendant Directors schemed and/or conspired to breach fiduciary duties owed to Plaintiffs, and used the United States mail and/or telephone and/or other wires in furtherance of such scheme or conspiracy. In particular, Plaintiffs show as follows:

    a. On or about November 1, 1982, the Director Defendants caused SSNB to purchase from BSBT the 80% of Plainsman Agricultural Credit Corporation which it did not already own. SSNB paid a total of approximately $1.2 million to BSBT, including $251,448 of good will. This transaction was disclosed in the 1982 Annual Report to SSNB Shareholders, but the disclosures regarding this transaction were false, misleading, and omitted material information in the following respects:

        (1) At or about the time of acquisition, Plainsman underwent an examination by the Federal Intermediate Credit Bank. Of total assets of $3,029,000 the examination revealed problem loans of $736,000 and loans with one or more well defined credit weaknesses of $2,085,000, or 90% of Plainsman's loan portfolio;

        (2) The annual report failed to disclose that the divestiture by BSBT of Plainsman was forced upon SSNB by Spikes and agreed to by the Director Defendants in an effort to shed BSBT of problem assets while earning for BSBT a "premium" of $250,000 to meet its needs in late 1982 for increased capital and liquidity;

        (3) At all times material hereto, Defendant MBank Dallas knew of the sale of Plainsman to SSNB, and approved of same.

    b. The Defendant Directors and Officers aproved of loan participations between SSNB and other banks wherein the participation was already in a classified status or was structured so as to prevent SSNB from having any commercially reasonable secured position in the participation. The Defendant Directors and Officers breached their duties to Plaintiffs in the following respects:

        (1) By the purchase on or about March 31, 1983 of approximately 100% of the line of credit of Edward Bartley in the approximate

amount of $191,386, funded by SSNB when the debtor's line of credit on BSBT was already classified and such was known to Defendants;

(2) By the 1981 purchase of a participation in the Floyd and Layton Oliver lines of credit originated by MBank Dallas. This line of credit was structured so that SSNB was "last out" in debt reduction and MBank Dallas "first in" in collection of interest and principal. MBank Dallas also had a superior lien position which did not secure any part of the SSNB participation.

c. Plaintiffs would show that they have suffered damages caused by the acts of the Defendants referred to herein, all of which will be more specifically pled hereafter.

COUNT VII

31. Plaintiffs adopt and incorporate all the allegations contained in paragraphs 4-30, and further show that in the furnishing of false Reports of Condition and Reports of Income, and further, the publication of same, constitute violations of 12 U.S.C. § 161. Plaintiffs would show the Defendant Directors and Officers committed such acts knowingly, and that Plaintiffs have suffered damages proximately caused as a result of these Defendants' acts as set forth herein, all of which will be more specifically pled hereafter.

COUNT VIII

32. Plaintiffs adopt and incorporate all the allegations contained in paragraphs 4-31, and further show that on six (6) occasions in 1982 and 1983, the Defendant Directors violated lending limits regarding the related debts of James R. Davis in violation of 12 U.S.C. § 84. Plaintiffs would show that the Defendant Directors committed such acts knowingly and that Plaintiffs have suffered damages proximately caused as a result of these Defendants' acts as set forth herein, all of which will be more specifically pled hereafter.

DAMAGE AS TO COUNTS I-VIII

33. Plaintiffs would show that the shares of stock of Seminole State National Bank, either owned by them in trust, or in a representative capacity, or individually, as a direct result of the Defendants' wrongful conduct, have become totally worthless. Plaintiffs have thus suffered actual damages in the approximate amount of $180,000.00. Pursuant to 18 U.S.C. § 1964(c), Plaintiffs are entitled to treble damages and their reasonable attorneys' fees.

COUNT IX

Come NOW, Plaintiffs, and as an additonal claim to their Complaints in Counts I-VIII, seek damages of the Defendants who are officers and directors of Defendant Seminole State National Bank, and Defendant MBank Dallas, and as grounds therefore would show this Court as follows:

34. This is a State claim which is a pendent claim related to the foregoing RICO violations, and this Court should have pendent jurisdiction of such related claims. Venue is proper.

35. Plaintiffs incorporate by reference the allegations contained in Paragraphs 4 through 33 as if fully set forth herein.

36. Plaintiffs would show that Defendants who are officers are directors of the Seminole State National Bank made false representations of material facts in annual reports and reports of comparative condition supplied to Plaintiffs. Such representations were made either with knowledge of the falsity or with reckless disregard of the truth, were justtifiably relied upon by Plaintiffs to their great harm, deteriment, and damage. Defendant MBank Dallas knew of these false representations and conspired with other members of the Spikes Easy Money Financial Group to conceal same from minority shareholders and thus breach fiduciary duties owned Plaintiffs.

37. These Defendants either committed these fraudalent acts while acting in a fiduciary capacity with Plaintiffs or conspired with other Defendants to override fiduciary duties owed Plaintiffs.

38. Plaintiffs would show that the conduct of the Defendants was willful and/or in such gross disregard for the rights and interests of Plaintiffs that Plaintiffs should be entitled to not only their actual damages for loss of the value of their stock in the approximate amount of $180,000.00, but also exemplary damages and attorneys' fees.

COUNT X

COME NOW, Plaintiffs and as and for their tenth count against those Defendants who are officers or directors of the Seminole State National Bank, would show this Court as follows:

39. Plaintiffs incorporate by reference the allegations contained in Paragraphs 4 through 33 as if fully set forth herein.

40. Defendants, as officers or directors of Defendant SSNB, owed a fiduciary duty to the Plaintiffs as minority shareholders, but breached that duty to exercise a high degree of care and to disclose material transactions which affected the value of the common stock of Defendant SSNB.

41. In further violation of this duty, Defendants, as officers or directors of Defendant SSNB, acted in breach of this duty by conduct which benefited corporate insiders, majority shareholders or their affiliates, and by their accounting procedures which misstated the true financial condition of the Bank.

42. Plaintiffs would show that they have suffered actual damages in the amount of $180,000.00 as a result of Defendants' breach of duty. Plaintiff would further show that they are entitled to exemplary damages because Defendants' conduct was willful and malicious, or in gross disregard of the rights of the Plaintiffs.

43. Inasmuch as this is an ongoing investigation into the conduct of the affairs of these Defendants, Plaintiffs reserve the right to amend this Complaint.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiffs procedures which misstated the true financial condition of the Bank.

1. Actual damages in the amount of $180,000.00 together with a trebling of same to $540,000.00, together with reasonable attorneys' fees, all as alleged in Counts I-VIII of this Plaintiffs First Amended Original Complaint;

2. Actual damages in the amount of $180,000.00, together with exemplary damages and reasonable attorneys' fees, all as alleged in Court IX of this Plaintiffs' First Amended Original Complaint;

3. Actual damages in the amount of $180,000.00, together with exemplary damages, all as alleged in Count X of this Plaintiffs' First Amended Original Complaint;

4. Costs of Court; and

5. Such other and further relief to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

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Attorney for Plaintiffs

This is to certify that the above and foregoing instrument has been served on the following, in accordance with the Federal Rules of Civil Procedure, on this 31st day of March, 1987.

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18 U.S.C. § 1961

§ 1961. Definitions

As used in this chapter —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), section 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement

from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual, or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision there of,or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1964

Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

12 U.S.C. § 93

§ 93. Violations of provisions of chapter; forfeiture of franchise; personal liability of directors; civil money penalty

(a) If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district or Territoral court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

(b) (1) Any national banking association which violates, or any officer, director, employee, agent, or other person participating in the conduct of the affairs of such association who violates any of the provisions of this chapter, or any of the provisions of section 92a of this title, or any regulation issued pursuant thereto, shall forfeit and pay a civil money penalty of not more than $1,000 per day for each day during which such violation continues. The penalty may be assessed and collected by the Comptroller of the Currency by written notice. As used in the section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(2) In determing the amount of the penalty the Comptroller shall take into account the appropriateness of the penalty with respect to the size of financial resources and good faith of the association or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require.

(3) The association or person assessed shall be afforded an opportunity for agency hearing, upon request made within ten days after issuance of the notice of assessment. In such hearing all issues shall be determined on the record pursuant to section 554 of Title 5. The agency determination shall be made by final order which may be reviewed only as provided in paragraph (4). If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

(4) Any association or person against whom an order imposing a civil money penalty has been entered after agency hearing under this section may obtain review by the United States court of appeals for the circuit in which the home office of the bank is located, or in the United States Court of Appeals for the District of Columbia Circuit, by filing a notice of appeal in such court within thirty days from the date of such order, and simultaneously sending a copy of such notice by registered or certified mail to the Comptroller. The Comptroller shall promptly certify and file in such court the record upon which the penalty was imposed, as provided in section 2112 of Title 28. The findings of the Comptroller shall be set aside if found to be unsupported by substantial evidence as provided by section 706(2) (e) of Title 5.

(5) If any association or person fails to pay an assessment after it has become a final and unappealable order, or after the court of appeals has entered final judgment in favor of the agency, the Comptroller shall refer the matter to the Attorney General, who shall recover the amount assessed by action in the appropriate United States district court. In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(6) The Comptroller may, in his discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under this section.

(7) The Comptroller shall promulgate regulations establishing procedures necessary to implement this subsection.

(8) All penalties collected under authority of this section shall be covered into the Treasury of the United States.

12 U.S.C. § 21

§ 21. Formation of national banking associations; incorporators; articles of association

Association for carrying on the business of banking under this chapter may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office.

§ 21a. Amendment of articles of association

Except as otherwise specifically provided by law, or by the articles of association of the particular national banking association, the articles of association of a national banking association may be amended with respect to any lawful matter, and any action requiring the approval of the stockholders of such association may be had by the approving vote of the holders of a majority of the voting shares of the stock of the association obtained at a meeting of the stockholders called and held pursuant to notice given by mail at least ten days prior to the meeting or pursuant to a waiver of such notice given by all stockholders entitled to receive notice of such meeting. A certified copy of every amendment to the articles of association adopted by the shareholders of a national banking association shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office.

Fed. R. Civ. P. 12

Rule 12. Defense and Objections — When and How Presented — By Pleading or Motion — Motion for Judgment on the Pleadings

(a) **When Presented.** A defendant shall serve an answer within 20 days after the service of the summons and complaint upon that defendant, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state. A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after the service upon that party. The plaintiff shall serve

a reply to a counterclaim in the answer within 20 days after the service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or in fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) **Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and

not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) **Preliminary Hearings.** The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) **Motion For More Definite Statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) **Motion to Strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initaitive at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) **Consolidation of Defenses in Motion.** A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) **Waiver or Preservation of Certain Defenses.**

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is

waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

S.Ct.R. 17

Rule 17 Considerations governing review on certiorari

(1) A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of jucidial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

(2) The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Cusoms and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

28 U.S.C. § 1254

§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1331

28 § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

12 U.S.C. § 161

12 § 161. Reports to Comptroller of the Currency

(a) Reports of condition; form; contents; date of making; publication

Every association shall make reports of condition to the Comptroller of the Currency in accordance with the Federal Deposit Insurance Act [12 U.S.C.A. § 1811 *et seq.*]. The Comptroller of the Currency may call for additonal reports of condition, in such form and containing such information as he may prescribe, on dates to be fixed by him, and may call for special reports from any particular association whenever in his judgment the same are necessary for his use in the performance of his supervisory duties. Each report of condition shall contain a declaration by the president, a vice president, the cashier, or by any other officer designated by the board of directors of the bank to make such declaration, that the report is true and correct to the best of his knowledge and belief. The correctness of the report of condition shall be attested by the signatures of at least three of the directors of the bank other than the officer making such declaration, with the declaration that the report has been examined by them and to the best of their knowledge and belief is true and correct. Each report shall exhibit in detail and under appropriate heads the resources and liabilities of the association

at the close of business on any past day specified by the Comptroller, and shall be transmitted to the Comptroller within ten days after the receipt of a request therefor from him; and the statement of resources and liabilities in the same form in which is made to the Comptroller shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association, and such proof of publication shall be furnished as may be required by the Comptroller. Special reports called for by the Comptroller need contain only such information as is specified by the Comptroller in his request therefor, and publication of such reports need be made only if directed by the Comptroller.

(b) Payment of dividends

Every association shall make to the Comptroller reports of the payment of dividends, including advance reports of dividends proposed to be declared or paid in such cases and under such conditions as the Comptroller deems necessary to carry out the purposes of the laws relating to national banking associations in such form and at such times as he may require.

(c) Reports of affiliates; forms; contents; date of making; publications; penalties

Each national banking association shall obtain from each of its affiliates other than member banks and furnish to the Comptroller of the Currency not less than four reports during each year, in such form as the Comptroller may prescribe, verified by the oath or affirmation of the president or such other officer as may be designated by the board of directors of such afiliate to verify such reports, disclosing the information hereinafter provided for as of dates identical with those for which the Comptroller shall during such year require the reports of the condition of the association. Each such report of an affiliate shall be transmitted to the Comptroller at the same time as the corresponding report of the association, except that the Comptroller may, in his discretion, extend such time for good cause shown. Each such report shall contain such information as in the judgment of the Comptroller of the Currency shall be necessary to disclose fully the relations between such affiliate and such bank and to enable the Comptroller to inform himself as to the effect of

of such relations upon the affairs of such bank. The reports of such affiliates shall be published by the association under the same conditions as govern its own condition reports. The Comptroller shall also have power to call for additional reports with respect to any such affiliate whenever in his judgment the same are necessary in order to obtain a full and complete knowledge of the conditions of the association with which it is affiliated. Such additional reports shall be transmitted to the Comptroller of the Currency in such form as he may prescribe. Any such affiliated bank which fails to obtain and furnish any report required under this section shall be subject to a penalty of $100 for each day during which such failure continues.